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## THE FREE CHURCH OF SCOTLAND CASE.

The case of the Free Church of Scotland in the House of Lords, General Assembly of Free Church of Scotland *v.* Lord Overtoun, Macalister *v.* Young,[1] is one of the most important ever decided in Great Britain, in respect of the amount of property involved, the number of people affected, and the general interest excited. As the litigation concerned dissenting or voluntary churches, unaffected by the peculiarities of establishment, the law laid down by their Lordships is, for the most part, applicable to the religious organizations of the United States, and so both the decision and the opinions are worth our study.

Since the Reformation, Scotch Christianity has been Presbyterian. The attempt of the Stuarts to impose Episcopacy failed, and since the English Revolution Presbyterianism has been established in the Church of Scotland or "Kirk". But the theological scruples to which the Scotch are prone have created many dissenting sects, Presbyterian in government, generally Calvinistic in theology, some of whose differences from the Kirk and from each other are intelligible only to one familiar with theology and Scotch history. These separations have occurred at all times, ancient and modern. Some of the sects are very small, some are large.

The most important secession took place about 1843, when the decision of the House of Lords in the Auchterarder case,[2] established the right of the lay patron of a living to nominate its incumbent without regard to the wishes of

[1] [1904] A. C. 515. [2] (1839) 6 Cl. & Fin. 646.

the parishioners. Nearly half the clergy and laity of the Kirk thereupon seceded, and established the Free Church of Scotland, or Free Kirk. This new body asserted its theological agreement with the church it had left, and its approval of the principle of establishment, *i. e.*, the State support of a designated religious body. It denied only the right of presentation to benefices. Soon afterwards lay patronage was abolished in the Kirk, but the schism continued. In sixty years the Free Kirk acquired churches, manses, colleges, funds, mission stations at home and abroad.

Except the Free Kirk, the most important dissenting Presbyterian body in Scotland was the United Presbyterian, founded by the union in 1847 of the "Relief Church" and the "United Secession." For many years the Free Kirk and the United Presbyterians had considered a union. This was accomplished in 1900, with practical unanimity on the part of the United Presbyterians, and by an immense majority in the Free Kirk. The minority in the latter, small but resolute, undertook litigation to determine the title to the whole vast property of the Free Kirk, claiming it on the ground that the new United Free Church had fatally departed from the doctrines and principles of the Free Kirk. Two test cases were prepared. The Lord Ordinary decided in favor of the Free Kirk, and dismissed the actions.[1] On Appeal, the Court of Session affirmed the decision in substance, though it "recalled the Lord Ordinary's interlocutor in so far as it dismissed the actions, and in lieu thereof assoilzied the respondents from the conclusions thereof."[2] By a vote of five to two (Lords Halsbury, Robertson, James of Hereford, Davey and Alverstone against Lords Lindley and Macnaghten), the House of Lords reversed the decree of the Court of Session, and decided that the property originally belonging to the Free Kirk had come to belong to the small minority which refused to unite with the United Presbyterians. Many millions of property thus changed hands (in theory, at least), and hundreds of thousands of people were made churchless. This decision I propose to examine from the stand-

[1] Bannatyne *v.* United Free Church (1902) 4 Fraser 1083; United Free Church *v.* M'Iver (1902) *Ib.* 1117.

[2] [1904] A. C. 558.

point of American law. It was rested upon two grounds: First, that the United Free Church had departed from the doctrine of the Free Kirk, in that it no longer adhered to the dogma of establishment, the dogma that a State ought to maintain a particular form of religion. Second, that the United Free Church had abandoned the dogma of predestination, which was an essential part of the doctrine of the Free Kirk.

The question raised would be deemed by an American lawyer to concern the construction of a charitable trust; and the construction of a trust depends upon the donor's intention, as manifested by the terms of his gift, when interpreted in the light of surrounding circumstances.

Two cases were appealed to the House of Lords. The first seems to have been brought by certain members of the minority of the Free Kirk, or Remnant, as I shall call it, against certain members of the United Free Church. It sought to affect both the legal and beneficial ownership of a large amount of property, formerly belonging to the Free Kirk, which was in the control of the United Free defendants at the time of suit brought. This suit was based, apparently, on two grounds, viz.: (1) That the members of the United Free in control of the fund were without legal title thereto, the legal title being in certain members of the Remnant, presumably the plaintiffs; and (2) that the beneficial use of the fund should be in the Remnant, and not in the United Free. In Scotland, it seems that both the legal and the beneficial ownership may be settled in one action having a form unknown to our law. The remedy sought is styled a declarator. By the declarator in this case, the court has declared once for all, regarding all the elements making up the fund in controversy, that the Remnant trustees are entitled to manage it, and that it shall be used for the purposes of the Remnant organization. This difference between Scotch and American law affects merely the remedy, and does not materially embarrass the consideration of the real question by a lawyer unfamiliar with Scotch procedure.

The second case before the House of Lords is less easy to understand. It concerned a particular church held by

trustees under what was styled the Model Trust Deed.[1] About eight hundred churches and manses, it is said, were held by various local trustees under this form of deed. The "acting trustees" and the Moderator of the General Assembly of the United Free Church were pursuers or plaintiffs. Apparently the parson and others adhering to the Remnant were defenders.[2] What relief the action sought does not appear in the Appeal Cases report, nor what is an "acting trustee," nor how the particular pursuers came to be acting trustees. From 4 Fraser 1117, it appears that a declarator was sought that the church and manse belonged to the pursuing trustees for a United Free congregation. At A. C. 519, it is said that "the appellants sought declaratory conclusions." Whether this statement includes the appellants in the second case or not, and, if not, what these appellants did seek, nowhere appears. Perhaps only the entry of a judgment for costs.[3] Who was the grantor under the Model Trust Deed does not appear, nor how the money originally subscribed for the purchase of the real estate was brought under the operation of the Deed. From the statements in A. C. 518 and in 4 Fraser 1117, it seems that the United Free were plaintiffs in the case, yet in A. C. 546, it is said that the Remnant "brought these actions." No explanation has been found of the apparent contradiction. The reporting of the Law Reports, usually so good, for once appears to have been at fault. Both the contending parties and the court seem to have agreed that the decision of this second case necessarily followed that of the first, a supposition which no American lawyer could make without fuller knowledge of the circumstances than is given by any report which I have seen. So far as appears, the donors, donees, deeds of gift, and beneficial uses, were different in the two cases.

Let us take the first case. Considering its importance, an American lawyer or judge would begin his consideration of it by setting out in full the language of the gifts by which the lands, properties and moneys in controversy came into the hands of the Free Kirk, the names of donors, the dates of gifts, whether by deed or will, and the circumstances and language of oral gifts, so far as possible. If several gifts

[1] [1904] A. C. 743; see also p. 597. [2] A. C. 518. [3] A. C. 723.

were made in the same language, and under similar circumstances, they might be classified accordingly, but the classification and its methods would be set out in the opinion of the court. The fund in suit was evidently composed of countless gifts, written and oral, made on various terms.[1] That one donor gave money for foreign missions by a bequest in one form, would be deemed by us of little importance in construing a gift by another donor half a century later for the establishment of a professorship of Hebrew. That the two gifts were administered by the same trustees would seem of little importance, so far as the beneficial use of the fund is concerned. In 4 Fraser, as well as in the A. C. report, there is no considerable reference to the terms of any of these gifts, which, as I have said, must have been numerous and varied. Take the gifts by will, omitting all others. The disposition of these several gifts must depend on the language of the several wills. So far as the surrounding circumstances may be considered in interpreting this language, each will must be construed according to its own circumstances, and not according to the circumstances surrounding another will. The disposition of the testator's bounty does not depend upon the trustee into whose hands it has come, but upon the testator's intent, as properly expressed. The House of Lords was thus construing wills by the hundred without reference to any of them. To interpret a will without reference to its terms seems to us an unusual proceeding. How far the agreement of counsel was responsible for the action of the court does not appear in the reports.

Whether the fund, made up of the gifts referred to, was held under a single declaration or deed of trust, does not appear. But a deed of trust executed to trustees, or a declaration of trust made by them, does not control the disposition of property thereafter or theretofore given by bequest for specified charitable purposes to the trustees above mentioned. Even if the bequest refers to the trustees' deed, the reference does not control the bequest, unless it makes the bequest subject to the terms of the deed. The omissions already mentioned in the reports and opinions, *First*, to state the precise question involved

[1] See A. C. 518.

in the two cases; *Second*, to recognize that the donors were many, and that the intention of one might be quite different from that of another; *Third*, to set out the language used in the several gifts; and *Fourth*, the failure in the first case to state if there was a general deed or declaration of trust, are omissions hard to understand. Some of them, but not all, may be set down to differences between Scotch and American law.

Let us omit consideration of the legal title to the property in dispute and the right to administer it, and deal only with the more important question, that of its beneficial use. Furthermore, let us ignore, not because we wish to do so, but because our ignorance is inevitable, the language by which the several gifts were constituted. Thus limited, let us ask ourselves: Would the facts, as stated, justify an American court in reaching the decision which was reached by the House of Lords?

In America, the funds would be deemed to be given and held for a public charity. The court would deem itself to be construing the terms of a charitable gift in the light of surrounding circumstances. Scotch ecclesiastical history would be deemed such a circumstance, and no more. It is not easy to state precisely the difference between the House of Lords and an American court; it is a difference in the point of view, rather than in the decision of any definite legal question. It may be illustrated by the introductory sentence of Lord Halsbury's opinion, compared with the introduction as an American judge would write it. Lord Halsbury starts with the history of the Free Kirk and the United Free. Lord James says "It is obvious that the first step toward the elucidation of the question before your Lordships' House is to determine the nature of the trusts controlling the properties in question."[1] And then he proceeds to the history of the disruption of 1843. An American court would begin in this fashion: "By the third paragraph of his will, A bequeathed property as follows" (quoting the paragraph). "The trustees to whom the bequest was thus made were constituted under a deed or declaration of trust which reads as follows." The Lords were so desirous to find out

[1] A. C. 655.

what was the Free Kirk that they almost forgot that the determination of that question was only an element possibly involved in deciding the final question in the cause before them, viz.: For what did each particular donor give his money? The Chancellor said "I am unable to understand by what test I am to ascertain what the donor of a fund has made essential to his gift, unless it is by what he has said or written."[1] And he thereupon quoted the language of Dr. Chalmers. But Dr. Chalmers was not the donor of the fund. His language was uttered, as Lord Macnaghten said, when "the fund was already in full swing."[2] He died before some of the donors were born. Even in his life time, other divines did not agree with him. The argument of the Chancellor and of some of the Lords of the majority seems to be this. The Free Kirk of 1843 considered essential the dogma of Establishment. When it is objected in argument that this principle is not declared essential in any confession, creed or authentic symbol, the Chancellor (and others) quote non-official and semi-official declarations, which do not show dogmas formally adopted and declared essential, but only the existing opinions of individuals, majorities, and perhaps of unanimities in the Free Kirk. And the Lords of the majority argue that these writings, though not formally adopted symbols of faith, yet so indicate the intention of donors that they may not be departed from. Let this be granted as to gifts then made. As Lord Robertson said "We are now, in 1873, entering the zone of negotiations",[3] that is to say, the period during which union with the United Presbyterians was contemplated. All gifts made after 1873 were made in view of possible union. Why should these gifts be affected by the mere opinions of an older generation? If the organization is to lose property given in 1843, without express provision for forfeiture, because of what the donors of 1843 have said or written, why should it lose property given in 1873 or 1893, without express provision for forfeiture, not because of the opinions of the latest donors, but because of the opinions of the earlier? The reasoning seems defective, and appears to have fol-

[1] A. C. 617. [2] A. C. 635. [3] A. C. 679.

lowed a failure to distinguish between the circumstances in which the several gifts were made.

As the donor's own language is not here stated, so that from it we can discover his intention, we turn to the form of organization which acted as his trustee. There were provisions—not stated in the report, it is true—for the perpetuation of that organization. It was intended to carry out the purposes which are supposed to be those of Christian churches; the maintenance of public worship, the education of the clergy, the preaching of the gospel, both in Scotland, and also by way of foreign missions to the heathen. The organization had a name which may have some doctrinal significance.

To the judgment of this organization, duly perpetuated, an American court would incline to hold that the donor had referred all questions concerning change of religious principles or dogmas. The judgment of the organization, indeed, might not be deemed absolutely conclusive.[1] But it is much easier to decide if, in the election of officers and in the choice of agents, a body has proceeded according to the terms of its constitution, by-laws, trust deed or charter, than to determine if certain persons are orthodox or heterodox, according to some symbol or standard specified or unspecified. In America, the trustee holding so large a charitable fund would almost certainly be a corporation. Lord James says[2] that the Free Kirk was not a corporation, but "a body united only by the possession of common opinions." Why? Why not by the possession of a common organization? The trustees were established in perpetuity, with some relation, not precisely stated, to a religious body. Stated roughly, the donors had entrusted property to Free Kirk trustees to hold the gifts for the charitable purposes of the Free Kirk. Succession in the trusteeship was somehow provided for. The question was, Who were and who were not to be deemed members of the religious body *quo ad* the gifts? In the absence of some body more authentically representative of the donor, an

[1] See Hale *v.* Everett (1868) 53 N. H. 9, where the majority of the court held that the doctrine objected to was anti-Christian. First Constitutional Presbyterian Church *v.* Congregational Society (1867) 23 Iowa 567; Harrison *v.* Hoyle (1873) 24 Ohio St. 254, 286.

[2] A. C. 656.

American court would ordinarily look to the organization which the donor himself had created or recognized, whether the Free Kirk or a body of trustees. That an American court attaches to the form of the organization more weight than does the House of Lords, appears farther from the Craigdallie case,[1] upon which the House of Lords relied largely in its decision of the case before us. There certain persons subscribed money to build a local church. The subscription, so far as appears, specified no doctrine or religious connection, but the church joined itself, and doubtless was intended to join itself, to a Presbyterian body, having an established form of government. A minority of the parishioners contended that both the organization and a majority of the parishioners had departed from the original doctrines of this particular Presbyterian body. The House of Lords held that, if this were so, the minority could take the property out of the hands of the majority. The report of the facts is imperfect, but the House of Lords seems to have held that a local ecclesiastical organization, with provision for succession, and without established standard of doctrine, was so far committed to the doctrine of its founders that any variation therefrom would deprive the organization of its property. In other words, the House of Lords seems to have held that the mere establishment of a local church, without designation of doctrine or sect, implies perpetual identity of doctrine with that professed by the founders. Thus Lord Halsbury said, "Speaking generally, one would say that the identity of a religious community, described as a Church, must consist in the unity of its doctrines." Even apart from express conditions, stress is thus laid wholly upon doctrine and not at all upon continuity of organization.

This theory does not prevail in the United States. If individuals subscribe to build a church in a given town, and provide for its management and the perpetual succession of its officers, there is nothing in their action which is deemed to imply that those officers or the majority of the society shall be deprived of the property because the

[1] Craigdallie *v.* Aikman (1813) 1 Dow. 1; aff. (1820) 2 Bli. 529. See Mor. Dec. 14584.

[2] A. C. 612.

majority of the society has changed its belief. The rule is thus stated in Robertson *v.* Bullions:[1] "That where, in a deed executed to trustees for religious purposes, the use is expressed in general, and not in specific terms, it cannot be *inferred* from the religious tenets and faith of the grantor, that it was intended to limit the use to the support of the particular doctrines which he professed, or the religious class to which he belonged; although, if the language creating the trust be ambiguous, evidence of the surrounding circumstances, and among them, perhaps, of the faith of the donor, may be received, as in other cases, to aid in its construction." And the Supreme Court of Massachusetts said in Attorney General *v.* Proprietors of Meeting-House,[2] "Every religious society, unless restrained by some special trust, by the general law were at liberty to change their denomination, to profess and peaceably to inculcate any Christian faith or doctrine, and adopt the form of worship most agreeable to themselves; and, by doing so, no forfeiture could be incurred." Thus the Supreme Court of the United States has said, speaking of a church of independent organization to which property has been given, with no specific trust attached other than that it is for the use of the congregation as a religious society: "In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property."[3]

If I have rightly interpreted the theory of the House of Lords in the Craigdallie case, it would be interesting to ascertain the cause of the difference just noted between the courts of England and the United States. May it not depend, at least in part, upon the different ecclesiastical history of the two countries? In America many local churches have been founded by individuals who combine to

[1] (1854) 11 N. Y. 243, 266. [2] (1854) 3 Gray 1, 57.

[3] Watson *v.* Jones (1871) 13 Wall. 679, 725. See also Petty *v.* Tooker (1860) 21 N. Y. 267; Miller *v.* Gable (1845) 2 Den. 492; Watkins *v.* Wilcox (1876) 66 N. Y. 654.

build, equip and maintain a church for their needs and those of a neighborhood which will presumably be peopled in part by their descendants. Not one in a hundred of these churches is endowed. They are maintained by pew rents and annual subscriptions, either or both. Hence they seem to depend less upon their founders, and more upon the society actually worshipping within their walls. From these circumstances, in part, may have come in America a control over its property by the existing members of a church greater than exists in England.[1] But the cause of the difference is not material to this discussion. If the Craigdallie case has been rightly interpreted, the difference exists, and is important.

Let us suppose, however, in order to bring ourselves to the standpoint of the House of Lords, that an American court has to construe a gift which, by its express terms, requires continued identity of doctrine in the church it establishes or recognizes. Even so, in the ascertainment of that identity our court would attach great weight to the judgment of the organization created by the gift. Some one must apply the test. An American court is unwilling to discuss theological doctrine if the discussion can be avoided.[2] The history of the world has proved that to ascertain what is identity of doctrine is more difficult than anything else. The denomination supposed probably has its tribunals, with judges trained in its doctrine. Where the congregation made part of a large and general organization of a religious denomination, the Supreme Court said: "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of law, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried,

[1] See Attorney General *v.* Proprietors Meeting-House (1854) 3 Gray 1.

[2] Smith *v.* Pedigo (1896) 145 Ind. 361, 375, 381, 420; Lamb *v.* Cain (1891) 129 Ind. 486; Schweiker *v.* Husser (1893) 146 Ill. 399, 427–429; Bear *v.* Heasley (1893) 98 Mich. 279, 290, 291, 292; East Norway Lake Church *v.* Halvorson (1890) 42 Minn. 503.

the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. We concede at the outset that the doctrine of the English courts is otherwise. In the case of Attorney-General *v.* Pearson, cited before, the proposition is laid down by Lord Eldon, and sustained by the peers, that it is the duty of the court in such cases to inquire and decide for itself, not only what was the nature and power of these church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard. And in the subsequent case of Craigdallie *v.* Aikman, the same learned judge expresses in strong terms his chagrin that the Court of Sessions of Scotland, from which the case had been appealed, had failed to find on this latter subject, so that he could rest the case on religious belief, but had declared that in this matter there was no difference between the parties. And we can very well understand how the Lord Chancellor of England, who is, in his office, in a large sense, the head and representative of the Established Church, who controls very largely the church patronage, and whose judicial decision may be, and not unfrequently is, invoked in cases of heresy and ecclesiastical contumacy, should feel, even in dealing with a dissenting church, but little delicacy in grappling with the most abstruse problems of theological controversy, or in construing the instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages. The dissenting church in England is not a free church in the sense in which we apply the term in this country, and it was much less free in Lord Eldon's time than now. Laws then existed upon the statute-book hampering the free exercise of religious belief and worship in many most oppressive forms, and though Protestant dissenters were less burdened than Catholics and Jews, there did not exist that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. And it is quite obvious, from an examination of the series of cases growing out of the organization of the Free Church of Scotland, found in Shaw's Reports of Cases in the Court of Sessions, that it was only under the pressure

of Lord Eldon's ruling, established in the House of Lords, to which final appeal lay in such cases, that the doctrine was established in the Court of Sessions after no little struggle and resistance. The full history of the case of Craigdallie *v.* Aikman, in the Scottish court, which we cannot further pursue, and the able opinion of Lord Meadowbrook in Galbraith *v.* Smith, show this conclusively. In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collection of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is

not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so. We have said that these views are supported by the preponderant weight of authority in this country, and for the reasons which we have given, we do not think the doctrines of the English Chancery Court on this subject should have with us the influence which we would cheerfully accord to it on others."[1]

The final result of the Craigdallie case does not tend to encourage the settlement of theological controversies by a court of law. Disregarding the judgment of the denomination, the House of Lords sent the case back to the Court of Session to determine if the majority had deviated from the doctrine of the donors. The Court of Session found "that the pursuers have failed in rendering intelligible to the Court, on what ground it is that they aver, that there does at this moment exist any *real* difference between their principles and those of the defenders." On a second appeal to the House of Lords, Lord Eldon said: "The Court (of Session) pronounced an interlocutor in which it describes the utter impossibility of seeing anything like what was intelligible in the proceeding; and I do not know how this House is to relieve the parties from the consequence. The Court of Session in Scotland were full as likely to know what were the principles and standards of the Associate Presbytery and Synod of Scotland, as any of your Lordships; and are as well, if not better, than your Lordships, able to decide whether any acts done or opinions professed by the defenders . . . were a deviation, on the part of the defenders from the principles and standards of the Associated Presbytery and Synod. If they were obliged to qualify their finding, as they do, intimating that they doubt whether they understood the subject at all. . . . I hope I may be permitted to say . . . that there may be some doubt whether we understand the subject, not only because the Court of Session was much more likely to understand the matter

[1] Watson *v.* Jones (1871) 13 Wall. 679, 727.

than we are; but because I have had the mortification, I know not how many times over, to endeavor myself to understand what these principles were, and whether they have, or have not, deviated from them; and I have made the attempt to understand it, till I find it, at least, on my part to be hopeless."[1] The majority of the church therefore kept the property.

Lord James of Hereford said, "I think, too, it was admitted by way of example that if change had introduced the doctrines of the Church of Rome, the identity of the Free Church would be lost."[2] The suggestion is that of an extreme case. The donors did not mean that their gifts should be used to maintain Roman Catholicism, Episcopalianism or Unitarianism, or Popery, Prelacy and Infidelity, as some would have styled them. From this undoubted fact it is argued that the donor's intention requires that the court itself should determine what is orthodoxy in the Free Kirk. But the conclusion does not follow from the admitted premises. If we are to seek the donor's real intention concerning the intervention of the secular court, we must ask, Did the donor prefer to leave the discrimination between Free Kirk orthodoxy and heterodoxy, to the ecclesiastical organization which he created or recognized, or to a secular court, which might contain no Presbyterians of any sort, would almost certainly contain Episcopalians and Roman Catholics, and might well contain Unitarians and Agnostics? I believe that an American court would conclude, except where the donor's language clearly indicated the contrary, that he preferred the first alternative to the second. Thus, in the Dublin case,[3] the court said "Suppose that Mr. Sprague (the donor) wished and intended that his own religious opinions should be maintained and taught in the society; might he not well say, 'I know the Congregational Society in Dublin, and can safely trust them with the choice of their own Congregational minister. I am well acquainted with their religious views; I have taught them religion for forty years. I think it best and safest to repose in them and their successors the

[1] (1820) 2 Bligh. 537, 542. [2] A. C. 664.
[3] (1859) 38 N. H. 459, 565.

trust of continuing and perpetuating my religious opinions; and I will not attempt to set forth and prescribe any set of doctrines which the minister of their choice must hold, in order that they may have the benefit of my charity. I will not send my townsmen, if any difference of opinion should spring up among them after my decease, to wrangle in courts of law upon the meaning of theological terms used in my will; the society may hold any doctrines that are admitted within the Congregational denomination.'" And it may be observed that the Roman Catholic Church, which is most scrupulous to preserve continuity and purity of doctrine, does not therefore encourage resort to secular tribunals in such matters, but deems that purity and continuity are best safeguarded by resort exclusively to an ecclesiastical tribunal. The Model Trust Deed in its Fourth Article provided expressly that the trustees should be subject to the direction of the General Assembly.

Thus far we have treated the requirement of identical doctrine either as arising from the nature of religious organizations, or as expressed in the instrument of gift. All must agree with the House of Lords, that a donor may provide in express terms for liberty of change. In the absence of such a provision, the House of Lords has decided that the donor is deemed to require continued identity of doctrine. An American court, I believe, would admit liberty of change in the absence of express requirement of identity, but the Free Kirk case might well have been decided without passing upon the general question. The House of Lords was not dealing with a gift which made no provision for union with other religious bodies. The Model Trust Deed was involved in Macalister *v.* Young. It appears to have had recognition by the Free Church at large.[1] It provided that the buildings in question should be used by a congregation of the Free Church "or of any united body of Christians composed of them, and of such other body or bodies of Christians as the said Free Church of Scotland may at any time hereafter associate to themselves, under the aforesaid name of the Free Church of Scotland, or under whatever name or designation they may assume, and to be

[1] A. C. 535.

made use of by such congregation occupying and enjoying the same, for the time being, in the way and manner in which, by the usages of the said body, or united body of Christians, places of religious worship may be, or are in use, to be occupied and enjoyed."[1] The House of Lords construed this clause so as to permit the Free Church to unite only with another church which professed identical doctrines.

This construction seems unnatural. In the absence of proof it is not to be supposed that two separate religious denominations co-exist holding precisely the same doctrines. Because of difference in doctrine, not because of identity, separate denominations exist, at least in America. To an outsider the differences may seem trivial, but they seem important to the denomination concerned. No hard and fast line can be drawn between matters of doctrine and of polity. Polity and ritual have been and are deemed matters of doctrine by many, probably most, religious bodies. To construe an express permission to unite with another denomination as forbidding union with any denomination of different doctrine, nullifies the permission. An instrument which expressly contemplates the union of two religious denominations must contemplate some sort of compromise between them. The Lord Chancellor observed: "These essentially diverse views (are not) avoided by selecting so elastic a formulary as can be accepted by people who differ and say that they claim their liberty to retain their differences while purporting to join in one Christian Church."[2] "Such an agreement would not, in my view, constitute a Church at all, or it would be, to use Sir William Smith's phrase, a Church without a religion."[3] To us in America, it does not seem extraordinary or matter of reproach that a church should leave to its members some liberty to differ in opinion. Here, this liberty is not uncommon. As students of ecclesiastical history, we have supposed that the Church of England by its Articles of Religion has largely provided for this liberty. Take the Tenth and Seventeenth Articles, for example. As Lord Halsbury observed, the doctrines of free will and predesti-

[1] A. C. 746. [2] A. C. 627. [3] A. C. 628.

nation were the subject of a copious amount of literature all through the seventeenth century. Are these Articles Calvinist or Arminian, or were they intended, as has been said, to admit both to the communion of the Church of England? If the last supposition be correct, did the Church of England thereby become a "Church without a religion"?

Another reason for holding that continuity of identical doctrine was not absolutely required in the Free Kirk, is to be found in the so-called Barrier Act of 1697, which seems applicable, at least by analogy, to the constitution of the Free Kirk. That Act directs General Assemblies to be very deliberate in making innovations, "and that the whole church have a previous knowledge thereof, and their opinion be had therein, and for presenting any sudden alteration or innovation, or other prejudice to the Church, in either doctrine or worship or discipline or government thereof, now happily established: do therefore appoint, enact, and declare, that before any General Assembly of this Church shall pass any Acts, which are to be binding rules and constitutions to the Church, the same Acts be" proposed and passed in a particular manner.[1] In other words, the Barrier Act provides that the General Assembly shall be very deliberate in changing the doctrine of the church, and in order to prevent sudden alteration shall make changes only after a specified manner of procedure, to wit, that adopted by the Free Kirk in its union with the United Presbyterians. If the Barrier Act does not recognize that a church within its purview may change its doctrine by proceeding as therein prescribed, it is hard to see how language can be framed to recognize this authority.

But let us suppose, merely for the sake of the argument, and almost impossible as is the supposition, that continued identity of doctrine in the Free Kirk was required by the donors of the property in question, notwithstanding the Model Deed and the Barrier Act, and that the House of Lords had to decide for itself, unaided by ecclesiastical decisions, the United Free Church had materially deviated from the doctrines of the Free Kirk. Even then an Amer-

[1] A. C. 736.

ican court would almost certainly answer the question thus put in the negative.

A court, asked to determine if a re-statement of doctrine is a material deviation from doctrines hitherto held by a religious body, must look to the general practice of religious denominations in order to ascertain what modifications they have been accustomed to make in their formulas without being deemed by themselves or by others to have deviated so materially from the established doctrine of the denomination as to destroy doctrinal identity. In England, the history of the English Church would naturally be referred to. Parliament is omnipotent, and can take the property of one religious body and transfer it to another if it so pleases. But the Anglican has not deemed that his communion has maintained its continuity and now holds its property altogether by parliamentary spoliation. Some of its divines have declared that essential continuity of doctrine has been maintained from the days of St. Augustine of Canterbury. Even if it be granted, contrary to the contention of some Anglicans, that there was a break of doctrinal continuity at the time of the Reformation, do Anglicans deem that the changes since made in their church constitute such material deviations that its continuity, admitted to have been broken in the sixteenth century, has since that time existed only by act of Parliament? An American court would naturally refer to American ecclesiastical history, and there it would find that the Protestant Episcopal Church of the United States, the successor of the Anglican church as it existed in colonial days, has altogether dropped one creed, the Athanasian or Quincunque Vult, and has twice amended the Apostles'Creed. Yet no one has suggested that these changes, and others, like the amendment of the Articles and the change of name, constitute such material changes in doctrine as to deprive the Protestant Episcopal Church of property previously given to the Anglican. There is property now held by Episcopal churches in America, given or devised before the Revolution for the purposes of the Anglican church. Can the recital or approval of the Athanasian Creed be enforced in these churches at the present time on penalty of forfeiture? No American court would consider such a proposition for a moment; yet the entire abandon-

ment of one creed and the repeated amendment of another constitute deviations quite as important as those decided to have been committed by the United Free Church. Suppose that the Church of England should now drop the damnatory clauses of the Athanasian Creed against the opposition of a small minority of its members, would the Lords of the majority consider that this action broke Anglican continuity of doctrine so as to forfeit all church property to the minority unless saved by Act of Parliament? Would the Church of England thereafter be deemed an historical, ecclesiastical and religious upstart, owing its position and property altogether to parliamentary omnipotence? Yet the abandonment of a creedal statement which declares in unambiguous English the necessary damnation of all who do not believe the doctrine of the Trinity as therein defined, is a doctrinal change greater than that involved in the admission to membership of persons who do not hold a pious but admittedly ineffective opinion concerning the duty of the State to maintain an established church. In America, one denomination has united with another in several cases.

It was argued that union with the United Presbyterians involved the abandonment of the Free Kirk dogma of establishment, and so involved a break in denominational continuity. To answer this question, an American court would first seek to determine if the dogma of establishment was so essentially a part of the Free Kirk doctrine as to make an admission to communion of those who do not hold it a breach of continuity in the Free Kirk. Not every change constitutes a breach of continuity.[1] The dogma of establishment, if dogma it be, was not laid down in express terms as a necessary requisite of communion in any official symbol of Free Kirk faith. In fact, it was but a pious hope, a counsel of perfection, in 1843. Since that time it has ceased to be even a hope. The Free Kirk left the Kirk in 1843 because its members considered other things more important than establishment and, for so doing, it was by the House of Lords stripped of its property devoted to religious purposes. In 1904, it is again stripped of all its property by the same

[1] Horsman *v.* Allen (1900) 129 Cal. 131, 135.

tribunal, because it does not exclude from communion every one who does not believe in an establishment. The first decision was based upon the statutes of the realm, the second upon the supposed intention of the seceders. The great majority of the Free Kirk have ceased even to desire the establishment of that body. It is not clear that union with the United Presbyterians has in fact enlarged the previous conditions of membership in the Free Kirk. As was said by Dr. Candlish, "the most prominent man after Dr. Chalmers," "Is the division and schism of the Christian Church to be kept up by a question as to the duty of another party (that is the State) over whom we have no control"?[1] Probably no one has been debarred from membership in the Free Church during the last generation for holding the doctrine concerning establishment professed by the United Presbyterians. On their part, the United Presbyterians seem to have refused expressly to make Voluntaryism an essential of communion. "Uniformity of opinion with respect to civil Establishments of religion is not a term of communion in the United Presbyterian Church."[2] Under these circumstances, I think that no American court could be found to hold that the official admission to full communion of persons unwilling to profess a theological belief in the dogma of establishment, will devolve the entire property upon a small minority which professes to hold this belief necessary. Therefore, even if the House of Lords was required of itself, and unaided by a denominational tribunal or by ecclesiastical decisions, to determine if union with the United Presbyterians involved such an abandonment of an essential dogma of the Free Kirk, viz.: the dogma of establishment, as to break denominational continuity, it seems that the question should have been answered in the negative.

The other alleged change of Free Kirk doctrine involved in the union concerns the doctrine of predestination. Only one or two of the Lords rested upon this consideration, and I am convinced that American Calvinist churches (and there are many) would be perplexed by the Lord Chancellor's reasoning. To ascertain the doctrine of the

[1] A. C. 600. [2] A. C. 621.

Presbyterian Church of Scotland concerning predestination, Lord Halsbury had recourse to the so-called Synod of Jerusalem in 1672. This Synod represented the Eastern Church in whole or in part, and the Council of Constantinople of 1642, upon which also he relied, appears to have been a similar body. To deduce the doctrine of Scotch Presbyterians from the pronouncement of a synod of the orthodox Greek Church, is as extraordinary as would be an ascertainment of the Anglican doctrine of the Eucharist from the decrees of the Council of Trent or from the Institutes of Calvin. With these somewhat unusual notions of ecclesiastical authority in the Church of Scotland, it is not surprising that Lord Halsbury should find insuperable differences of opinion where a theologian of training more occidental would fail to discover them. Lord Halsbury finds irreducible conflict in the two following pronouncements: The first, that of the Westminster Confession, concerning God's eternal decree "By the decree of God, for the manifestation of his glory some men and angels are predestinated unto everlasting life, and others foreordained to everlasting death. These angels and men, thus predestinated and foreordained are particularly and unchangeably designed; and their number is so certain and definite that it cannot be either increased or diminished." The second pronouncement is found in the Declaratory Act of 1892. "That this church also holds that all who hear the Gospel are warranted and required to believe to the saving of their souls; and that in the case of such as do not believe, but perish in their sins, the issue is due to their own rejection of the Gospel call. That this Church does not teach, and does not regard the Confession as teaching, the foreordination of men to death irrespective of their own sin." [1]

What bearing the Declaratory Act has upon the case before the Lords is hard to discover. It is no part of the act of union, has nothing to do with the United Presbyterian Church, and, if it be heretical and unconstitutional, and contrary to the Westminster Confession, it was the act of the whole Free Kirk passed in due form, and not brought into controversy in the suits before the House of Lords

[1] A. C. 625.

And if Lord Halsbury was inclined to suppose that these two symbols stated theological dogmas absolutely contradictory, he should have turned to the Tenth and Seventeenth Articles of the Church of England, and should seek to discover which of the two contradictory theories was supported by these Articles. Speaking seriously, I cannot understand how anyone familiar with controversies concerning the nature of free will could reach Lord Halsbury's conclusion.[1] And after the Declaratory Act of 1892, at any rate, a donor to the Free Kirk is not to be supposed more Calvinist than the Declaratory Act.

Finally, I think that an American court would stand amazed at what I may call the lightheartedness of the House of Lords in rendering its momentous decision. To deprive a great religious body of all its property would be deemed in America a serious matter. If the law made deprivation necessary, it would be decreed, but the decree would be made with great and, as I conceive, with proper reluctance. It is easy to say "Let justice be done though the sky fall," but if the fall of the sky is the necessary result of the decision, a court is bound, in the opinion of American judges, to ponder well before concluding that the decision is necessary. "While, of course, consequences may not determine a decision, yet in a doubtful case the court may well pause before thereby it unsettles interests so many and so vast."[2] The decision of the House of Lords makes us wonder if the constitutional safeguards existing in America do not make American courts more careful in reaching their conclusions. The majority of the House of Lords knew, of course, that the enormous hardship they were creating might be remedied by Parliament. In America, the legislature would be powerless to give any remedy, and an American court rendering any decision like that under consideration would know that its action was really and truly final, and so, I think, would hesitate at taking it. The suggestion just made is confirmed by the events which followed the decision. Scotland was thrown into confusion. Nearly everyone assumed that the decision of the Lords would be denied,

[1] See Gable *v.* Miller (N. Y. 1844) 10 Paige 627.

[2] Butte City Water Co. *v.* Baker (1905) 196 U. S. 119.

that the United Free Church would keep most of the property of the Free Kirk, and that, in some way, an amount of property would be fixed which the United Free Church must turn over to the Remnant as the price of retaining the rest. Thereupon various proceedings were had, both at law and extra legal; and at its next session Parliament passed an act which provided for the appointment of a commission to "allocate between the Free Church (*i. e.* the Remnant) and the United Free Church the property in question as defined by this Act in such manner as appears to the Commission fair and equitable, having regard to all the circumstances of the case."[1]

We find, then, that the Free Church case is hard to understand. *First*, from the omission in the report of a statement of the precise controversy. *Second*, from the failure of the Lords to seek the intentions of the individual donors of the fund in question. *Third*, from the assumption that continued identity of doctrine, apart from express requirement, is essential to a Christian Church. *Fourth*, from the disregard of the ecclesiastical judgment of the Free Church upon the dogmatic questions involved. *Fifth*, from the failure to recognize that modification of doctrine was expressly permitted by the Barrier Act, and union with another religious body by the Model Trust Deed. *Sixth*, from an exaggeration of the importance of the principle of establishment, and from an erroneous conception of Calvinism not entertained by American Calvinists.

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[1] Stat. 5 Edward VII. (1905) Chap. 12.